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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA HARRELL, Defendant and Appellant.	A156017 (Solano County Super. Ct. No. FCR336781)

A jury convicted Joshua Harrell of three felony counts of fraudulent possession of the personal identification of another after having been previously convicted of this offense. (Pen. Code, § 530.5, subd. (c)(2) (section 530.5(c)(2)).[1] The trial court found that Harrell suffered a prior strike conviction and four prior prison terms, and sentenced him to an aggregate term of 12 years and 8 months in prison.

On appeal, Harrell contends: (1) the judgment must be reversed because of the erroneous denial of his motion to suppress evidence; (2) his convictions must be reclassified as misdemeanors under section 490.2; and (3) the four prior prison term enhancements must be stricken due to an amendment to section 667.5, subdivision (b) (section 667.5(b)) that will become effective in January 2020. We reject Harrell's first contention but agree that his convictions must be reclassified as misdemeanors and that the section 667.5(b) enhancements must be stricken.

[1] Statutory references are to the Penal Code unless another statute is cited.

BACKGROUND

In March 2018, Harrell was charged by felony complaint with three counts of violating section 530.5(c)(2) on November 24, 2017. In April 2018, Harrell filed a motion to suppress evidence pursuant to section 1538.5, arguing that he was subjected to an unlawful detention, search and arrest. The motion was heard concurrently with the preliminary hearing on June 18, 2018.

At the June 18 hearing, Fairfield Police Officer Kevin Anderson testified that he encountered Harrell shortly before 3:00 a.m. on November 24, 2017. Anderson was patrolling a residential neighborhood when he noticed a gold BMW parked on the street that did not have license plates, which was a violation of the Vehicle Code. He approached the car so he could obtain the VIN number and noticed through the windows that Harrell was asleep in the driver's seat and there "was a lot of miscellaneous property spread out throughout the car." Anderson attempted to wake Harrell by speaking through the window, which was rolled down about five inches, and by knocking on the window with his flashlight. When Harrell finally woke up, Anderson identified himself as police and asked Harrell to roll the window down or open the door so it would be easier to talk. Harrell did not comply with that request or with the officer's request to see identification. He told Anderson that he did not want to talk and did not want to get out of the car. Anderson then asked for Harrell's name and date of birth, which Harrell provided.

Anderson testified that he used the information provided by Harrell to run a record check through Fairfield Police Dispatch and was advised that Harrell was on Post Release Community Supervision (PRCS). Accordingly, Anderson "removed [Harrell] from the car to conduct a PRCS compliance check of the vehicle." Anderson found notebooks and paperwork on the seats and floorboard of the car. The notebooks contained personal identifying information for approximately 20 people. After completing the car search, Anderson read Harrell his rights and placed him under arrest. Subsequently, Anderson contacted several people who were referenced in the notebooks found in the BMW and they reported that Harrell did not have permission to have their personal information.

After Anderson completed his testimony, the People submitted documentary evidence regarding Harrell's identity theft prior and the magistrate took judicial notice of the case in which Harrell had been placed on PRCS. The defense did not present evidence. But, during argument, defense counsel argued that the People failed to carry their burden of producing independent evidence establishing that Harrell was on PRCS or subject to a search condition. Defense counsel further argued that the detention was unlawful in any event because Harrell was not doing anything wrong and he was not obligated to engage with the officer even if he was on PRCS. Finally, defense counsel argued that the search of Harrell's phone was not justified because the People did not produce evidence regarding the scope of the PRCS search clause.

The magistrate denied Harrell's suppression motion finding: "The initial contact was supported by reasonable suspicion. The arrest was supported by probable cause. The detention was not unduly prolonged. The motion to suppress is denied." The magistrate also found sufficient evidence to support the identity theft charges and held Harrell to answer on the complaint.

In the superior court, Harrell filed a renewed motion to suppress evidence. On August 13, 2018, the court denied Harrell's motion, finding a sufficient factual basis for the magistrate's conclusions. Thereafter, the case proceeded to trial, where the jury found Harrell guilty of three felony counts of acquiring or keeping the personal identifying information of K.H., T.S. and C.W. after having previously suffered a conviction for this same crime. (§ 530.5(c)(2).)

DISCUSSION

I. The Denial of Harrell's Suppression Motion Was Not Error

Harrell contends the judgment must be reversed because illegally seized evidence was used to secure his convictions.

A. Standard and Scope of Review

A criminal defendant may "challenge the reasonableness of a search or seizure by making a motion to suppress at the preliminary hearing. [Citation.] If the defendant is unsuccessful at the preliminary hearing, he or she may raise the search and seizure matter

before the superior court under the standards governing a section 995 motion." (*People v. McDonald* (2006) 137 Cal.App.4th 521, 528–529 (*McDonald*).) In that situation "the superior court's role is similar to that of an appellate court reviewing the sufficiency of the evidence to sustain a judgment." (*Id*. at p. 529.) On appeal, we too review the determination of the magistrate at the preliminary hearing. (*Ibid*.) We accept all factual findings supported by substantial evidence. Then we exercise independent judgment to determine whether the search or seizure was reasonable on the facts found by the magistrate. (*Ibid*.; see also *People v. Romeo* (2015) 240 Cal.App.4th 931, 940.)

B. The Detention and Vehicle Search Were Lawful

We begin with Harrell's contention that his detention was unjustified. "A police officer may detain a person if the officer has a reasonable articulable suspicion that the detainee is or is about to be engaged in criminal activity." (*McDonald, supra,* 137 Cal.App.4th at p. 530.) "[W]hen there is articulable and reasonable suspicion that a motorist is unlicensed, that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law, the vehicle may be stopped and the driver detained in order to check his or her driver's license and the vehicle's registration." (*People v. Saunders* (2006) 38 Cal.4th 1129, 1135 (*Saunders*).)

Accepting, for purposes of appeal, Harrell's contention that he was detained as soon as Officer Anderson woke him and asked for identification, the record shows that Officer Anderson had an articulable reasonable suspicion to detain Harrell because he was sleeping in a car that did not have license plates. "Absence of license plates provides reasonable suspicion that the driver is violating the law. Unless there are other circumstances that dispel that suspicion, that resolve any ambiguities in the legal status of the vehicle's conformance with applicable laws, the officer may stop the vehicle and investigate without violating the driver's Fourth Amendment rights." (*People v. Dotson* (2009) 179 Cal.App.4th 1045, 1052; see also *Saunders, supra*, 38 Cal.4th at p. 1136.) Here, the officer's initial interaction with Harrell revealed circumstances that reinforced an objective suspicion that Harrell was engaged in unlawful activity because Harrell declined to provide identification demonstrating his lawful possession of the BMW.

Harrell also disputes the magistrate's conclusion that the vehicle search was lawful. However, substantial evidence that Officer Anderson knew Harrell was on PRCS justifies the vehicle search. "[A]n individual who has been released from custody under PRCS is subject to search (and detention incident thereto) so long as the officer knows the individual is on PRCS. PRCS, like parole, involves the post-incarceration supervision of individuals whose crimes were serious enough to result in a prison sentence and thereby implicates important public safety concerns, as well as the state's ' " 'overwhelming' " ' interest in supervising released inmates." (*People v. Douglas* (2015) 240 Cal.App.4th 855, 865 (*Douglas*).)

In this case, before Officer Anderson ordered Harrell to exit the vehicle, he was accurately informed by the police department's dispatch officer that Harrell was on PRCS until 2020. Further, contrary to Harrell's lower court argument, the precise terms of Harrell's PRCS release are not relevant to our evaluation of the propriety of the search. "It is not necessary for the officer to recite or for the People to prove the precise terms of release, for the search condition is imposed by law, not by consent. As in the case of a parole search, an officer's knowledge that the individual is on PRCS is equivalent to knowledge that he or she is subject to a search condition." (*Douglas*, *supra*, 240 Cal.App.4th at p. 865.)

Harrell contends that the search executed by Anderson was nevertheless unlawful because it was conducted to harass him. The Legislature has explicitly stated that PRCS status does not "authorize law enforcement officers to conduct searches for the sole purpose of harassment." (§ 3067, subd. (d).) Despite the fact that the law does not require particularized suspicion to conduct a search pursuant to a properly imposed search condition, such a search may be unreasonable if it is conducted " 'too often, or at an unreasonable hour, or if it [is] unreasonably prolonged or for other reasons establishing arbitrary or oppressive conduct by the searching officer.' " (*People v. Reyes* (1998) 19 Cal.4th 743, 753–754 [addressing a parole search condition].)

Here, the record contains substantial evidence that Officer Anderson approached the BMW because of a Vehicle Code violation, that Harrell declined to provide

information establishing his right to possess the unlicensed vehicle in which he was sleeping, and that Officer Anderson conducted a search of the vehicle because he was informed that Harrell was on PRCS and subject to a statutory search condition. These facts constitute objective justification for the officer's conduct and establish that the search was not conducted for the purpose of harassment.

II. Harrell's Convictions Must Be Reclassified as Misdemeanors

Harrell's felony convictions were for violating section 530.5(c)(2), which states: "Every person who, with the intent to defraud, acquires or retains possession of the personal identifying information . . . of another person, and who has previously been convicted of a violation of this section, upon conviction therefor shall be punished by a fine, by imprisonment in a county jail not to exceed one year, or by both a fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170."

Harrell contends these felonies must be reclassified as misdemeanors pursuant to Proposition 47 because they are theft offenses and there is no evidence that the value of the personal identifying information that Harrell acquired or retained exceeded $950.

"Approved by the voters in 2014, Proposition 47 (the 'Safe Neighborhoods and Schools Act') reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies. To that end, Proposition 47 amended or added several statutory provisions, including new . . . section 490.2, which provides that 'obtaining any property by theft' is petty theft and is to be punished as a misdemeanor if the value of the property taken is $950 or less." (*People v. Page* (2017) 3 Cal.5th 1175, 1179; see also *People v. Romanowski* (2017) 2 Cal.5th 903.)

There is disagreement in the appellate courts about whether a violation of section 530.5(c) is a theft offense that must be treated as a misdemeanor when the value of the personal identifying information that the defendant obtained did not exceed $950. (Compare *People v. Chatman* (2019) 33 Cal.App.5th 60, 65–69 (*Chatman*), rev. granted June 26, 2019, S255235 [a conviction under section 530.5(c)(2) is a theft offense] with *People v. Weir* (2019) 33 Cal.App.5th 868, rev. granted June 26, 2019, S255212 [a violation of section 530.5(c) is a nontheft offense].)

Until the Supreme Court resolves the conflict, the position taken by this division has been set forth in *People v. Chatman*, which we follow here. Because the record contains no evidence that the personal identifying information Harrell acquired or retained was valued at more than $950, each of his offenses must be reduced to misdemeanors under section 490.2. (*Chatman, supra*, 33 Cal.App.5th at p. 69.)

III. The Prior Prison Term Sentence Enhancements Must Be Stricken

As noted, the trial court found that Harrell suffered four prior prison terms within the meaning of section 667.5(b), which currently states that when a defendant is convicted of a felony and sentenced to prison, "in addition and consecutive to any other sentence therefor, the court shall impose a one-year term for each prior separate prison term or county jail term imposed under subdivision (h) of Section 1170 or when sentence is not suspended for any felony . . . ."

Effective January 1, 2020, section 667.5(b) will enhance punishment only for prior prison terms served "for a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code . . . ." Here, none of Harrell's prior prison terms were for sexually violent offenses. Therefore, if he had been sentenced after January 2020, the court could not have imposed the four one-year sentence enhancements for Harrell's prior prison terms. Harrell contends the statutory amendment to section 667.5(b) applies retroactively to him because it will go into effect before the judgment in this case will become final. (Citing *In Re Estrada* (1965) 63 Cal.2d 740.)

The People contend that Harrell's claim that he is entitled to the benefit of amended section 667.5(b) is not ripe for review until the amendment actually goes into effect in January 2020. But they otherwise concede that once the amendment goes into effect, "it will apply retroactively to defendants whose judgments are not yet final," including Harrell.

"[F]or the purpose of determining retroactive application of an amendment to a criminal statute, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed." (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) Because the record shows that the judgment in this case will not yet

be final on January 1, 2020—indeed, we must remand for resentencing in light of Proposition 47's effect on this case—we reject the People's contention that this issue is not ripe for review. As the People concede, under the *Estrada* rule Harrell is entitled to the benefit of amended section 667.5(b), which means that the sentence enhancements previously imposed pursuant to this statute must be stricken. We note that section 667.5(b), even in its current form is also inapplicable once the felonies on which Harrell was convicted are reduced to misdemeanors.

DISPOSITION

Harrell's convictions are reduced to misdemeanor violations of section 490.2, subdivision (a), and this case is remanded for resentencing consistent with this opinion. The judgment is otherwise affirmed.

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TUCHER, J.

WE CONCUR:

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STREETER, Acting P. J.

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BROWN, J.